IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 7083 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? NO.

2. To be referred to the Reporter or not? NO.

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3. Whether Their Lordships wish to see the fair copy of the judgement? NO.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? NO.

5. Whether it is to be circulated to the Civil Judge? NO.

MANOJKUMAR AMRUTLAL MEHTA

Versus

NARAYANBHAI KALIDAS PATEL

Appearance:

MR KETAN D SHAH for Petitioner

MR DA SURANI for Respondent No. 1

MR SR DIVETIA, APP for Respondent No. 2

CORAM : MR.JUSTICE M.H.KADRI

Date of decision: 21/08/98

C.A.V.JUDGMENT :

1. The petitioner by filing this application under Section 482 of the Code of Criminal Procedure (to be referred to as "the Code") has prayed to quash the

complaint, which is registered as Criminal Case No.1026/97, filed by the respondent No.1, in the Court of learned Judicial Magistrate First Class, Idar, for the offence punishable under Section 138 of the Negotiable Instrument Act, 1881 (to be referred to as " the Act ").

2. The allegations made in the complaint, which is filed by the respondent No.1, is summarized as under :

Respondent No.1 is an agriculturist and residing at village Narshipura. The petitioner is carrying on business of selling foodgrains and oil seeds and purchasing the said goods from various agriculturists of nearby villages. It is alleged that the petitioner had purchased 208 mounds of raida at the rate of Rs.205 per mound. At the time of taking delivery of the said goods, on March 2, 1996, katcha receipt was signed and delivered to respondent No.1 by the petitioner showing the weight and price of the goods supplied by respondent No.1. As per the version of the complainant, the total price of the goods came to Rs.42,640.00. Towards the said outstanding amount, the petitioner issued cheque No.188869, dated March 13, 1996, for Rs.42,640.00, drawn on Sabarkantha-Gandhinagar Grame Bank, Idar Branch, in favour of respondent No.1. When the said cheque was deposited for encashment in the Bank, it came to be dishonoured. It is further alleged that the petitioner had purchased agricultural produce from various agriculturists and had issued cheques towards the purchase price of the said goods. It is further alleged that the said cheques, when deposited for encashment in the Bank by various agriculturists, issued by the petitioner, came to be dishonoured. It is further alleged that the petitioner has been deliberately avoiding service of notices so that he has not to pay the due amounts to various agriculturists. As per the version of the complainant, after the cheque was dishonoured, he had issued notice through his advocate by registered post and by "UPC", on April 15, 1996, which came to be returned with postal endorsement "party is not residing, hence returned". It is further alleged that the petitioner was absconding without giving any address at his native place and he was deliberately avoiding service of notice. When the complainant came to know that the petitioner had returned to his native place, he again served notice on June 9, 1997, through his advocate, by registered post. The said notice was served on the petitioner on June 14, 1997, but he refused to take delivery of the said notice. As the petitioner has failed to pay the amount of cheque within fifteen days, as per the notice served on him, a complaint came to be

lodged on July 29, 1997 in the court of learned Judicial Magistrate First Class, Idar.

3. The learned Judicial Magistrate First Class, Idar, after due verification of the complaint issued summons against the petitioner for the offence under Section 138 of the Act. The petitioner by way of filing this petition under Section 482 of the Code has challenged the issuance of the summons by the learned Magistrate and prayed to quash the complaint.

4. Learned counsel for the petitioner has argued that the complaint lodged by the respondent No.1 is clearly barred by the period of limitation as prescribed under Sections 138 and 142 of the Act. It is submitted that the first notice dated April 15, 1996, was sent at the correct address of the petitioner, which had been returned with postal endorsement "party not residing, hence returned", and, hence, the notice was deemed to have been served on the petitioner as per the provisions of Section 94 of the Act and as per the provisions of Section 27 of the General Clauses Act. It is submitted by the learned counsel for the petitioner that the cause of action for filing the complaint had arisen when the first notice was sent by the respondent No.1 on April 15, 1996 and by issuing second notice, no fresh cause of action can be created so as to bring the complaint within the period of limitation as prescribed under the Act. It is lastly submitted by the learned counsel for the petitioner that the complaint was ex-facie time barred and the learned Magistrate erred in taking cognizance, and, therefore, the complaint requires to be quashed.

5. Learned counsel for the respondent No.1 has vehemently submitted that the complaint lodged by the respondent No.1 is within the period of limitation and the cause of action had arisen only on June 14, 1997 when the petitioner had received the statutory notice as prescribed under Section 138 (b) of the Act. It is submitted that the first notice was not received by the petitioner, and therefore, no cause of action had arisen on the issuance of the first notice. It is submitted that, when the first notice was sent, the petitioner was not residing at his native place, and, therefore, it cannot be held that there was service of notice on the petitioner. It is submitted that as per Section 142 (b) of the Act, the complaint for dishonour of the cheque can be filed within one month from the date on which the cause of action arises under clause (c) of the proviso to Section 138 of the Act. In the light of the above provisions, it is submitted by the learned counsel for

the respondent No.1 that the cause of action only arises when the drawer of the cheque fails to make the payment of the amount of the dishonoured cheque within 15 days of the receipt of the notice. Lastly, it is submitted by the learned counsel for the respondent No.1 that the question whether the complaint is time barred or whether the first notice had been returned unserved with postal endorsement "party not residing, hence returned", is a mixed question of law and facts, which can be decided by leading evidence at the trial and when the disputed question of fact is involved, this Court should not interfere with the same, and the application be rejected.

6. The question which thus naturally arises for consideration is whether the complaint filed by the complainant is time barred ? In order to answer the abovereferredto questions, it would be relevant to notice provisions of Section 138 and 142 of the Act which read as under :

138 Dishonoured of cheque for insufficiency, etc.of funds in the account Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either, because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extent to twice the amount of the cheque, or with both :

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been resented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier :

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount or money by giving a notice in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank

regarding the return of the cheque as unpaid ; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

Explanation :- For the purpose of this Section, "debt for other liability " means a legally enforceable debt or other liability.

142 Cognizance of offence- Notwithstanding anything contained in the Code of Criminal Procedure, 1973, (2 of 1974),-

(a) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque ;

(b) such complaint is made within one month of the date on which the cause of action arise under clause (c) of the proviso to Section 138 ;

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under Section 138.)

7. From the above quoted provisions, it becomes clear that under the provisions of Clause (c) of Section 138 of the Act, the cause of action for the filing of complaint arises on the failure of the drawer " to make payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice " given under Clause (b) thereof and not before that. No complaint can, therefore, legally be filed before the abovesaid period. That being so, the material and the relevant date for the accrual of the cause of action for such complaint is the date of receipt of such notice by the drawer. There are number of ways of the service of the legal notice as envisaged under Section 138 of the Act. Notice can be served either by personal service taking the acknowledgment of the same or through postage. In the case of service of notice by the postage, there are several ways for the purpose. It can be sent through the registered post, through the registered post accompanied with the A.D., general

delivery or through the U.P.C.. However, if the accused denies the service of any notice to him, it is difficult to prove the same in case of general delivery by post as there is no evidence led for the purpose except the statement of the person sending the notice. In the case of service of notice through registered post A.D. or the U.P.C. it is not that difficult. Atleast it can be said that notice was really served on the accused. Once it is concluded that the notice was served through registered post and the receipt thereof is brought on record, it is the presumption that the notice has been duly served on the accused. In the case of notice sent by U.P.C., there is a presumption that unless it is returned to the sender, it is reached the addressee within a reasonable time. Normally as far as the service of notice is concerned, the same has to be served specifically to the person against whom the prosecution has to be launched. However, in certain cases, presumption of service of notice can be raised. In a case where after the dishonouring of the cheque, the notice is issued under Section 138, and the same is received back with the endorsement unclaimed, it may amount to acceptance of the delivery of the notice and complaint filed may be maintainable under the Section. Similarly whether the demand notice is received back with an endorsement " refused to accept " it would amount to acceptance of the delivery of the notice and the complaint filed on that basis would be maintainable under the provisions of the Act. When there is deliberate evasion of service of notice and the same is supported by the statement of the complainant on oath as taken by the Magistrate, it would be sufficient to establish prima facie case of the complainant, and therefore, the process can be issued to the accused. The contention, if any, that the offence is not committed till the notice under Clause (c) of the proviso is served and the drawer fails to make payment within 15 days of the said service is not correct, the commission of offence is complete as soon as the cheque is dishonoured. The period of 15 days given in Clause (c) of the proviso is just to give one more opportunity to the drawer of the cheque to escape punishment provided by Section 138 of the Act.

8. However, neither the averments made in the complaint nor averments made in the petition establish that the petitioner was quite aware of the sending of the notice by the complainant and had deliberately avoided the receipt of the same. It is not the case of the petitioner that he was aware of the sending of the first notice by the complainant and with a view to deliberately avoiding the receipt of the same, he had left his

residence nor it is pleaded in the complaint by the complainant that the petitioner was quite aware of the sending of the notice by the complainant and had deliberately avoided the receipt of the same. In the complaint what is pleaded is that with a view to avoiding liability to pay the amount to the complainant and others, the petitioner was absconding. However, this averment made in the complaint cannot be construed to mean that the petitioner was quite aware of the sending of the notice by the complainant and had deliberately avoided the receipt of the same. Under the circumstances the principles of constructive service of notice cannot be made applicable to the facts of the present case as there was neither actual service of first notice not constructive service of first notice on the petitioner, I am of the view that the complaint based on the service of second notice is within the time prescribed by law and cannot be quashed on the ground that it is filed beyond the period prescribed under the Act. It is relevant to note that the petitioner has not pleaded that filing of complaint from the date of service of second notice is time barred as there was no constructive service of first notice, the sole contention advanced on behalf of the petitioner that the complaint is time barred, and therefore, should be quashed, cannot be accepted.

9. Reverting back to the authorities cited at the bar by the learned counsel for the petitioner, I am of the view that they are not applicable to the facts of the present case. In the case of S. Prasanna vs. Vijayalakshmi, reported in 1992 Criminal Law Journal, 1233, there was deliberate evasion of the notice which was sent by registered post, and therefore, it was held that it would amount to constructive service of notice. In the present case I have already come to the conclusion that there was no deliberate evasion of the notice by the petitioner, and therefore, it cannot be said that there was constructive service of first notice on the petitioner. Under the circumstances, the decision rendered in case of S. Prasanna (Supra) does not help the petitioner. Again in the case of A.B.Steel vs. Coromandal Steel Products, reported in 1992 Company Cases, Vol.74, page 762, a cheque dated December 11,1990 for Rs.70,000/- issued by the second accused was presented by the complainant on December 17, 1990, for realization and it was returned unpaid with an endorsement "referred to drawer " due to lack of sufficient funds. The complainant had thereafter issued notice on December 27, 1990, calling upon the accused to pay the amount due. In order to escape from the consequences of Section 138 of the Act, the accused had

managed to return the notice with an endorsement " not found". The registered letter was received back by the complainant on January 19, 1991. Immediately thereafter the complainant had gone to the place of business of the accused and asked him to take notice which the accused had refused to accept. In light of the above facts and circumstances of the case the Madras High Court has held that the accused had sufficient knowledge about the notice and there was constructive service of notice on him. It is not the case of the petitioner in the petition that he had managed to return the first notice with an endorsement " not found " nor it is the case of the petitioner that he had refused to accept the notice. Under the circumstances, it is difficult to hold that there was constructive service of first notice on the petitioner. Thus, the second decision relied on by the learned counsel for the petitioner cannot be pressed into service for claiming reliefs as prayed for in the application.

10. In the case of L. Mani v. Kandan Finance, reported in 1996 Company Cases, Vol. 86, page 205, the notice senT by the complainant had returned with the endorsement " gone out two days-deposit " and other endorsement to the effect " left without instruction". In light of the abovereferred to endorsements, the High Court in my view rightly held that there was no service of statutory notice on the original accused, and therefore, the complaint under Section 138 of the Act was not maintainable. In that case no second notice was served on the accused as is served in the present case, and therefore, when there was no service of statutory notice, obviously the complaint would not be maintainable. Therefore, the decision rendered in the case of L. Mani (Supra) is of no assistance to the petitioner.

11. Again in the case of Mandhadi Ramchandra Reddy vs. Gopumareddy Ram Reddy and others, reported in 1997 (4) Crimes 151, the petitioner had issued cheque dated April 30, 1994, which on presentation was returned with an endorsement "insufficiency of funds". The cheque was again presented on October 6, 1994, and on second presentation also it was dishonoured with the same endorsement. The respondent No.1 had issued notice dated October 27, 1994, which was returned unserved with the endorsement " the petitioner was not found on the address ". Thereafter, several attempts were made to serve the said notice on the petitioner and ultimately endorsement was made by the postal department on November 12, 1994 that "the petitioner was not found ". With that

endorsement the notice was returned to the complainant on November 16, 1994. Thereafter, a complaint was filed on January 24, 1995, in the Court by the respondent No.1. On these facts the Andhra Pradesh High Court had held that if legal notice as required under Section 138 of the Act is not sent on proper address, even if it is returned on ground that the accused was not found on said address, it should be deemed to have been served on the addressee. In my view, the facts of the said case are quite different from the facts of the present case. Apart from that a finding is recorded that there was no justification for sending the second notice and second notice was sent only to create a fresh cause of action which was not permissible. As held earlier by me in the earlier part of the judgment, it is not the case of the petitioner that he was quite aware of the sending of the first notice by the complainant and had deliberately avoided the receipt of the same. Under the circumstances, I am of the view that principle of constructive service of notice cannot be pressed into service so far as facts of present case are concerned. On interpretation of provisions of Section 138 of the Act I have already concluded that only in certain cases presumption of service of notice can be raised. Presumption of service of notice can be raised when there is deliberate evasion of the service of notice and not otherwise and as there is nothing to establish that the petitioner had deliberately avoided the service of notice, the judgment rendered in the case of Mandhadi Ramchandra Reddy (Supra) is of no help to the petitioner. Having regard to the facts and circumstances of the case, I am of the opinion that the presumption under Section 27 of the General Clauses Act, 1897, and Section 114 of the Indian Evidence Act cannot be raised in favour of the petitioner because the first notice issued by the complainant was returned to him with an endorsement " not found " at the address.

12. Learned counsel for the respondent No.1 has argued that in order to fasten the criminal liability, the personal service of the notice is imperative and as first notice was actually not served on the petitioner, the complaint filed on the basis of second notice is not time barred and is maintainable. When the petitioner has failed to prove the case of constructive service of first notice, I am of the view that it is not necessary for me to decide the question whether actual service of the notice is imperative and whether principle of constructive service of notice can be made applicable to notice issued under Section 138 of the Act. I have already held that the first notice was never served on

the petitioner. Neither the averments made in the petition nor the record of the case indicate that the complainant had served second notice with a view to create fresh cause of action for filing the complaint. The cause of action under Section 142 (b) of the Act arises after the receipt of the notice by the drawer and after the expiry of period of 15 days from the date of receipt of the notice. When the first notice was not received by the petitioner at all, it cannot be said that cause of action had accrued to the complainant within 15 days of the service of said notice because it was never served on the petitioner. The complainant was perfectly justified in giving the second notice and filing the complaint within the stipulated time, when the petitioner failed to make payment demanded from him within 15 days of the receipt of the notice. Thus, the complaint is not liable to be quashed on the ground that the complaint filed by the complainant is time barred. The application, therefore, cannot be entertained and is liable to be rejected.

13. Except the abovereferredto contentions, no other contention has been raised by the learned counsel for the petitioner in support of the present application.

14. For the foregoing reasons, I do not find any substance in the application. The application fails and is dismissed. Rule discharged.

After pronouncement of this order, learned counsel Mr.Ketan.D.Shah, appearing for the petitioner has requested to continue the interim relief granted earlier,for a period of six weeks so as to enable the petitioner to approach the Honble Supreme Court. In view of the facts and circumstances of the case, the interim relief granted earlier shall continue for a further period of six weeks from today so as to enable the petitioner to approach the Honble Supreme Court to challenge this order.

Date : 21-8-98 (M.H.Kadri,J.)

(mithabhai)